

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 22, 2004

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Discount Drug Mart, Inc.
Case 8-CA-34716

560-2575-6767-2500
560-5067-4050
560-7540-8060-6717
578-8075-8050-7000
578-8075-8050-7700

The Region resubmitted this case for advice as to whether the neutral Employer's lawsuit allegation attacking the Union's deployment of an inflated rat outside its facility was unprotected activity.

We conclude that the Employer could reasonably believe that the Union's placement of an inflated rat directly in front of the Employer's store, along a busy road and without adequately identifying the primary employers, was not protected activity, but picketing that gave the public the impression that the neutral Employer was the "rat" employer. Therefore, the Region should not allege in its complaint that the Employer's lawsuit was unlawful to the extent it sought to enjoin the Union's handbilling and picketing at the facility in question.

FACTS

In a previous Advice Memorandum in this case,¹ we concluded that Discount Drug Mart's (the Employer) action to enjoin the Ohio and Vicinity Regional Council of Carpenters' (the Union) handbilling was baseless and retaliatory.² We were unable to determine, however, whether it was reasonable for the Employer to believe that the Union's handbilling in the presence of an inflated rat balloon was unprotected

¹ Discount Drug Mart, 8-CA-34718, Advice Memorandum dated May 26, 2004.

² The Employer obtained on October 15, 2003, a temporary restraining order prohibiting the Union from distributing copies of a handbill that described the Employer's relationship with non-Union contractors, whom the Union described as "rats." The court dismissed the Employer's petition for a permanent injunction.

activity. Therefore, we directed the Region to investigate, among other things, the placement of the inflated rat relative to the store; the size and appearance of the inflated rat; the number, location, and conduct of Union agents; whether the Union agents wore Union insignia; whether the Union agents were ambulatory or relatively stationary; and the length of time/number of days the rat and the Union agents were present at the Employer's store.

The Region's investigation has disclosed that on October 16, 2003, the Union handbilled and displayed an inflated rat balloon at the Employer's Parma Heights, OH, store (the store) to protest installation work by non-Union contractors Siemens Dematic and Erie Industrial Equipment at the Employer's Medina, OH, warehouse.³ The Union tethered its rat balloon to two utility poles on the sidewalk along York Road, directly in front of the store, for two or three hours beginning at about noon.⁴ Based on the Union's evidence, the Union posted the rat about 50 feet from the store's entrance and exit doors.

The Union stationed two agents at the store's entrance and exit doors, and another four agents on the sidewalk near the rat.⁵ The Union agents stationed near the rat remained there most of the time, but occasionally walked back and forth on the sidewalk and approached customers in the parking lot to offer them handbills. The agents at the entrance and exit doors offered handbills to customers there and in the parking lot. There is no evidence that Union agents attempted to block customers' ingress to or egress from the parking lot or the store; chanted or shouted at customers; or engaged in any physically confrontational conduct.

The Employer called the Parma Heights police while the Union agents were present at the store. The store manager showed the responding officer the October 15 TRO, asserting that it prohibited the Union's conduct. Though not specifically enforcing the TRO, the officer asked the Union agents to leave the Employer's property, and to remove its

³ The warehouse is adjacent to the Employer's corporate headquarters, approximately 24 miles from the store.

⁴ The store is the largest of five businesses included in a strip mall. The Region described the other four businesses, a nail salon, a pizzeria, a tanning salon, and a video rental store as "storefronts."

⁵ An Employer witness stated that he witnessed six to eight Union agents positioned near the rat.

rat from the public sidewalk because the rat impeded pedestrian traffic, creating a safety hazard. The Union complied with the officer's requests; the Union agents stationed at the entrance and exit doors moved to the sidewalk near the other Union agents, and the Union agents removed the rat balloon.

Although the Union handbilled with rat balloons at other Employer stores subsequent to the court's denial of the injunction sought by the Employer, the Union has not handbilled or displayed its rat balloon at the Parma Heights store since October 16.

ACTION

We conclude that the Union's October 16 conduct at the store was tantamount to picketing. The placement of the rat falsely signaled to consumers that the Employer was the primary "rat" employer with whom the Union had a dispute, and implicitly called the public to boycott the Employer. Thus, the Employer could reasonably believe that the Union's conduct was not protected handbilling, but unprotected picketing. Accordingly, the Region should not allege in its complaint that the Employer's lawsuit was unlawful to the extent that it attacked the Union's October 16 conduct as a secondary boycott.

A. The Union's Intentionally Misleading Message Was Not Protected Free Speech.

Section 8(b)(4) proscribes picketing and "all [union] conduct . . . inten[ded] to coerce, threaten, or restrain third parties to cease doing business with a neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective."⁶

Mere persuasion of customers not to patronize neutral establishments does not, in and of itself, coerce employers within the meaning of Section 8(b)(4)(ii)(B). On the contrary, the Supreme Court in DeBartolo II⁷ concluded that a union's peaceful distribution of area standards handbills urging a consumer boycott of neutral employers did not

⁶ Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190, 1204 (2001). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), *enfd. mem.* 103 F.3d 139 (9th Cir. 1996) (citations omitted).

⁷ Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568 (1988)

constitute "restraint or coercion" under Section 8(b)(4)(ii)(B). The Court noted that there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements.⁸ Thus, the Court interpreted the phrase "threaten, coerce, or restrain" with "'caution,'" and not with a "'broad sweep'" to exclude non-picketing activities partaking of free speech.⁹

The First Amendment, however, does not protect knowingly false statements, or statements made with reckless disregard of whether they are false.¹⁰ Accordingly, the Board "tolerates intemperate, abusive and inaccurate statements made by [a] union during attempts to organize employees, [but] it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false."¹¹

In San Antonio Community Hospital v. Southern California Dist. Council of Carpenters,¹² the Ninth Circuit determined that a union's banner declaring, "THIS MEDICAL FACILITY IS FULL OF RATS," was "fraudulent language . . . directed at an entity with which no labor dispute exist[ed]."¹³ The union there claimed that its banners, and its use of the term "rat" in particular, were intended to publicize the union's dispute with the primary employer, a construction subcontractor. The Ninth Circuit, however, noted that the union failed to explain the context for the term "rat," and failed to clarify that the hospital in that case was not involved in the labor dispute. In those

⁸ 485 U.S. at 574-77.

⁹ *Id.* at 578 (quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960)).

¹⁰ New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

¹¹ Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 61 (1966). See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) (applying the standard announced in New York Times and Linn, the Court found use of the term "scabs" in a union newsletter to describe certain employees was not a "reckless and knowing falsehood" but was "literally and factually true").

¹² 125 F.3d 1230 (9th Cir. 1997).

¹³ *Id.* at 1236.

circumstances, "the most natural reading" of the banner would be that the hospital had a rodent problem, which the union conceded was untrue. Accordingly, the Ninth Circuit held that the union's use of the term "rat" was "fraudulent, deceptive, . . . intended to mislead the general public" and, therefore, was not protected speech under the First Amendment.¹⁴ San Antonio Community Hospital is consistent with the Supreme Court's decision in Tree Fruits¹⁵ and with Board law interpreting that decision.¹⁶

We have previously concluded, in Brandon Regional Hospital,¹⁷ that conduct similar to the Union's conduct here was intentionally misleading and, therefore, not protected under the First Amendment. In Brandon, the Union deployed a tall inflated rat along a main road, 100 feet from the hospital's main entrance, as a handful of union agents handbilled. By comparison, the Union here deployed its rat directly in front of, but closer to, the store's main entrance, intentionally misleading the public by falsely portraying the Employer as the primary target of the Union's campaign. Thus, as in Brandon, the Union's provocative use of the "rat" in this case constitutes knowingly false statements and, therefore, does not implicate First Amendment concerns.

Unions' use of the term rat and rat caricatures to convey to the general public that an employer operates non-union or otherwise fails to meet area standards has been well documented.¹⁸ By placing a huge inflated rat along a

¹⁴ Id. at 1236 - 1237.

¹⁵ NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58 (1964) (unions may appeal to customers of a retail store not to buy products of struck firms, but they may not use ambiguous language to attempt to persuade customers not to trade at all with a secondary employer).

¹⁶ See, e.g., Local 248, Meat & Allied Food Workers, 230 NLRB 189, fn. 3 (1977) *enfd.* 571 F.2d 587 (7th Cir. 1978), citing Atlanta Typographical Union No. 48 (Times-Journal), 180 NLRB 1014, 1016 (1970) (union's misleading communications violated Section 8(b)(4)(ii)(B); signs failed to adequately identify the struck product or the primary employer).

¹⁷ Case 12-CC-1258, Advice Memorandum dated April 4, 2003.

¹⁸ See, e.g., San Antonio Community Hospital, above, 125 F.3d at 1236. [*FOIA Exemption 5*

main road, more than 20 miles away from the warehouse where the primary employers were performing the installation work, but only about 50 feet from the store's main entrance, without explanation, the Union has knowingly given consumers the false impression that the Employer is a "rat" employer. Absent any identifying information regarding the rat, the Union did nothing to clarify a different way in which the Employer was involved in a labor dispute, assuming passing motorists could have read such information. Moreover, because Union agents were not clearly identified, the general public could reasonably believe that they were, or were associated with, store employees, further suggesting the existence of a primary dispute with the store. Thus, the Union's message would reasonably convey to the general public that the Employer is the primary employer in the labor dispute; such a misrepresentation is unlawful under Tree Fruits and its progeny.

The general public could reasonably believe that the Union was portraying the Employer as the rat, even though the store is only one of five businesses in the strip mall. The rat was directly in front of the store rather than off to one side or at one of the parking lot entrances, which might have created some ambiguity as to which business the Union was targeting.¹⁹ Moreover, handbilling Union agents were stationed at the store's entrance and exit doors, clearly visible from the street, and were also stationed by the rat on the sidewalk. Thus, passing motorists and potential customers would see handbilling Union agents posted by both the store doors and the inflated rat, and reasonably conclude that the two groups were affiliated, and that the Employer, rather than one of the other tenants in the strip mall, was the "rat."

B. The Union's Use Of An Inflated Rat, A Well-Known Symbol Of Labor Unrest, Is Tantamount To Picketing

Traditional union picketing involves individuals patrolling while carrying placards attached to sticks. The Board has long held, however, that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the

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¹⁹ Indeed, the Union's photographs, apparently taken across York road from the rat, give the impression that the store is a stand-alone facility.

equivalent of traditional picketing.²⁰ On the other hand, the Board has stated that "[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."²¹ Along the same lines, "[t]he important feature of picketing appears to be the posting by a labor organization ... of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."²²

Picketing involves a "'mixture of conduct and communication,'" and does not solely depend upon the persuasive force of the idea being conveyed, but rather on "the conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'"²³ Thus, picketing is meant to cause those approaching the location of the demonstration to take some sympathetic action, such as not entering the facility involved. The "conduct element" in picketing may also invoke a response regardless of any message.

In determining whether employees are engaged in DeBartolo handbilling or picketing, the Board looks to whether, under the totality of the circumstances, a union is using conduct, rather than speech, to induce a sympathetic response. For example, because of its confrontational and coercive nature, the presence of mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may

²⁰ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

²¹ Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

²² Stoltze Land & Lumber Co., above, 156 NLRB at 394; see also United Mine Workers District 12 (Truax-Traer Coal Co.), 177 NLRB 213, 218 (1969), enfd. 76 LRRM 2828 (7th Cir. 1971).

²³ See DeBartolo II, above, 485 U.S. at 580, quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

constitute picketing.²⁴ The photographing of neutrals as they pass through an entrance has also been found to be an indicium of picketing in circumstances where it is found to be coercive.²⁵ The Board has even found that signs placed in proximity to the entrance may constitute picketing under certain circumstances.²⁶

Here, as in Brandon, the Union's deployment of a large inflated rat, is not pure speech as defined in DeBartolo II, but the kind of "mixture of conduct and communication"

²⁴ See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992)(finding mass picketing in violation of 8(b)(4)(ii)(B) where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)"); Truax-Traer Coal Co., above, 177 NLRB at 218 (finding picketing where approximately 200 union agents arrived at the worksite and congregated around or in their parked cars).

²⁵ See General Service Employees Union Local 73 (Andy Frain), 239 NLRB 295, 306, 307 (1978) (finding union's handbilling was picketing that violated 8(b)(4)(i) and (ii)(B) where union distributed handbills, displayed signs in parked cars, photographed neutrals, and previously picketed facility; finding union's photographing under circumstances inherently coercive where it took place at reserved neutral gate and where cameras had no film).

²⁶ See, e.g., Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (finding picketing that violated 8(b)(7)(B) where the union stuck two picket signs, which were monitored by union agents from a nearby car, in a snowbank in front of the employer's facility after the union had engaged in three months of traditional picketing at the facility); see also Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987) (union signs were placed at or near one or more of the entrances to common situs so that they could be read by anyone approaching them); Construction & General Laborers Local 304 (Athejen Corp.), 260 NLRB 1311, 1319 (1982) (union placed signs on safety cones, barricades, and on jobsite fence).

intended to "provide[] the most persuasive deterrent to third persons about to enter a business establishment."²⁷ In Brandon, we determined that the union's misleading communications, the location of the rat relative to the neutral employer and the primary employer, and signage on its rat, established that the union was using conduct rather than speech to evoke a sympathetic response from the general public. In comparison, several aspects of the Union's conduct in this case are more egregious than that in Brandon, bolstering our conclusion that the Union was picketing on October 16.

The most notable comparisons with Brandon involve the Union's placement of its rat and its failure to identify the primary employer. As in Brandon, the Union displayed its rat along a main road in front of the neutral employer's facility. While in Brandon the rat was perhaps more than 100 feet from the main entrance, here the rat appears to be no more than 50 feet from the main entrance to the store. The union in Brandon stationed its rat a few hundred yards from the primary's job site; the Union here stationed its rat more than 20 miles from where the primary employers were working. The union in Brandon posted the name of the primary on the rat. Consumers in Brandon might have been confused as to how the hospital and the named primary were related. Here the rat is completely unidentified, and consumers would have had no reason to consider that another employer was involved in the labor dispute. Finally, as in Brandon, the Union's display of its rat did not include a specific request that consumers boycott the primary employer rather than the neutral. Thus, the totality of the Union's conduct establishes that the Union was using conduct, rather than speech, to induce a sympathetic response.²⁸ The reasonably foreseeable effect was that current and potential customers would be dissuaded by the Union's conduct from entering the store which, in turn, would unlawfully coerce the Employer to cease doing business with Siemens and Erie.²⁹

²⁷ DeBartolo II, above, 485 U.S. at 580, quoting NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607, 619 (1980).

²⁸ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB at 283, citing Carpenters Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB at 394. See also Service Employees Local 87 (Trinity Maintenance), above, 312 NLRB at 743.

²⁹ See generally Safeco, above, 447 U.S. 607; Honolulu Typographical, 401 F.2d 952, 957 (D.C. Cir. 1968) ("[W]hen customers must refuse to respect a picket line in order to

Given our conclusion regarding the inflated rat, the Employer could reasonably believe that the Union's Parma Street conduct was not protected under the Act. The Employer's lawsuit attacking that conduct as an unlawful secondary boycott thus does not violate Section 8(a)(1).

B.J.K.

enter the store, the storekeeper is being threatened within the meaning of [Section 8(b)(4)(ii)(B)]".).